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03
04 UNITED STATES DISTRICT COURT
05 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

06 KURT E. GRIEMSMANN,) CASE NO. C08-1592-TSZ
07)
Plaintiff,)
08)
v.) REPORT AND RECOMMENDATION
09) RE: SOCIAL SECURITY DISABILITY
MICHAEL J. ASTRUE, Commissioner) APPEAL
of Social Security,)
10)
Defendant.)
11)

12 Plaintiff Kurt E. Griemsmann proceeds through counsel in his appeal of a final decision
13 of the Commissioner of the Social Security Administration (Commissioner). The
14 Commissioner denied plaintiff's applications for Disability Insurance (DI) and Supplemental
15 Security Income (SSI) benefits after a hearing before an Administrative Law Judge (ALJ).
16 Having considered the ALJ's decision, the administrative record (AR), and all memoranda of
17 record, the Court recommends that this matter be REVERSED AND REMANDED FOR AN
18 AWARD OF BENEFITS.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1956.¹ He has a high school education, attended some

21 _____
22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 community college, and previously worked as a carpenter. (AR 95, 148.)

02 Plaintiff filed an application for DI and SSI benefits on September 29, 2005, alleging
03 disability beginning July 2, 2005. He is insured for DI benefits through September 30, 2009.
04 (AR 15.) Plaintiff's application was denied at the initial level and on reconsideration.
05 Plaintiff timely requested a hearing. On March 24, 2008, ALJ Verrell Dethloff held a hearing,
06 taking testimony from plaintiff. (AR 39-67.) On June 18, 2008, the ALJ issued a decision
07 finding plaintiff not disabled. (AR 15-23.)

08 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review
09 on October 3, 2008 (AR 6-9), making the ALJ's decision the final decision of the
10 Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

11 **JURISDICTION**

12 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

13 **DISCUSSION**

14 The Commissioner follows a five-step sequential evaluation process for determining
15 whether a claimant is disabled. See 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
16 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had
17 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be
18 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
19 lumbar degenerative disc disease and right shoulder rotator cuff tear severe. Step three asks
20 whether a claimant's impairments meet or equal a listed impairment. The ALJ found that
21 plaintiff's impairments did not meet or equal the criteria of a listed impairment. If a claimant's
22 impairments do not meet or equal a listing, the Commissioner must assess residual functional

01 capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to
02 perform past relevant work. The ALJ found plaintiff able to perform the full range of light
03 work with occasional postural movements and frequent overhead reaching with the right upper
04 extremity. With that assessment, the ALJ found plaintiff unable to perform his past relevant
05 work as a carpenter. If a claimant demonstrates an inability to perform past relevant work, the
06 burden shifts to the Commissioner to demonstrate at step five that the claimant retains the
07 capacity to make an adjustment to work that exists in significant levels in the national economy.
08 Applying the Medical-Vocational Guidelines, 20 C.F.R. Part 404, Subpart P, Appendix 2, the
09 ALJ found plaintiff capable of performing a significant number of jobs that exist in the national
10 economy and, therefore, not disabled.

11 This Court's review of the ALJ's decision is limited to whether the decision is in
12 accordance with the law and the findings supported by substantial evidence in the record as a
13 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
14 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
15 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
16 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
17 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
18 F.3d 947, 954 (9th Cir. 2002).

19 Plaintiff argues that the ALJ erred by failing to find his depression a severe mental
20 impairment at step two of the sequential analysis, by failing to find his back impairment
21 equivalent in severity to a listing impairment at step three, in finding him not fully credible, by
22 failing to consider all of his non-exertional limitations in the RFC assessment and, therefore, by

01 erroneously utilizing the Medical-Vocational Guidelines at step five. He requests remand for
02 an award of benefits or, alternatively, for further administrative proceedings. The
03 Commissioner argues that the ALJ's decision is supported by substantial evidence, applied
04 correct legal standards, and should be affirmed.

05 Credibility Determination

06 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
07 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001).
08 *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony
09 unreliable, an ALJ must render a credibility determination with sufficiently specific findings,
10 supported by substantial evidence. "General findings are insufficient; rather, the ALJ must
11 identify what testimony is not credible and what evidence undermines the claimant's
12 complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "We require the ALJ to
13 build an accurate and logical bridge from the evidence to her conclusions so that we may afford
14 the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d
15 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his
16 reputation for truthfulness, inconsistencies either in his testimony or between his testimony and
17 his conduct, his daily activities, his work record, and testimony from physicians and third
18 parties concerning the nature, severity, and effect of the symptoms of which he complains."
19 *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

20 Plaintiff contends that the ALJ erred in finding him not credible, arguing that the ALJ
21 failed to provide a legally sufficient basis for rejecting his pain testimony as to the degree of his
22 pain and limitations. The ALJ noted that plaintiff testified his back and shoulder problems

01 prevented him from working. (AR 19 (“He had difficulty with prolonged sitting, standing, and
02 moving about. He had a right shoulder injury, and severe lower extremity pain. He estimated
03 that he could lift up to 10 pounds.”)) The ALJ acknowledged the responsibility to make a
04 finding as to the credibility of plaintiff’s statements “about the intensity, persistence, or
05 functionally limiting effects of pain or other symptoms...based on a consideration of the entire
06 case record” if plaintiff’s statements “are not substantiated by objective medical evidence”.

07 (*Id.*) In that regard, the ALJ made the following findings:

08 After considering the evidence of record, the undersigned finds that the
09 [plaintiff’s] medically determinable impairments could reasonably be expected
10 to produce the alleged symptoms; however, the [plaintiff’s] statements
11 concerning the intensity, persistence and limiting effects of these symptoms are
12 not credible to the extent they are inconsistent with the residual functional
13 capacity assessment for the reasons explained below.

14 (AR 19.)

15 Although the ALJ goes on to discuss the medical evidence, he does not return to the
16 issue of plaintiff’s credibility. While acknowledging the duty to make this assessment if
17 plaintiff’s statements “are not substantiated by objective medical evidence”, the ALJ reaches no
18 such conclusion. Nor does the ALJ explicitly find plaintiff not credible by virtue of his
19 self-description of his daily activities. At the most, the ALJ concludes that plaintiff’s daily
20 activities “are consistent with the residual functional capacity determination in this case”, an
21 example of circular reasoning that does nothing to explain why the ability to take 20 minute
22 walks twice a day, to sit for 30-45 minutes, lift 10 pounds, and do light household chores, as
23 testified to by the plaintiff (AR 47, 50, 51, 57), is evidence of the ability to lift up to 20 pounds,
24 do “a good deal” of walking or standing, or sit “most of the time”, as light work is defined in the

01 regulations. 20 C.F.R. §§ 404.1567(b), 416.967(b). Certainly, the ALJ's recitation of
02 plaintiff's daily activities does not include the "specific findings relating to [the daily]
03 activities" and their transferability that is necessary to reach the conclusion that a claimant's
04 daily activities warrant an adverse credibility determination. *Orn v. Astrue*, 495 F.3d 625, 639
05 (9th Cir. 2007) (citing *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)).

06 In response to plaintiff's contention that the ALJ failed to provide a legally sufficient
07 basis for rejecting his testimony, the Commissioner discusses the medical evidence at some
08 length and expands on the ALJ's discussion of plaintiff's daily activities. Notwithstanding the
09 Commissioner's effort to discern a reasonable justification to find plaintiff's subjective
10 complaints not fully credible, plaintiff correctly notes that the ALJ failed to specifically identify
11 what testimony was not credible and what evidence undermines the plaintiff's complaints.
12 *See, e.g., Blakes*, 331 F.3d at 569 ("[R]egardless of whether there is adequate evidence in the
13 record to support an ALJ's decision, the ALJ must articulate the grounds for her decision,
14 building an accurate and logical bridge between the evidence and her conclusion because we
15 confine our review to the reasons supplied by the ALJ.") (citing *Steele v. Barnhart*, 290 F.3d
16 936, 941 (7th Cir. 2002)).

17 The ALJ's negative credibility finding about plaintiff's statements about the intensity,
18 persistence and limiting effects of his symptoms are not supported by substantial evidence.
19 When the ALJ's reasons for rejecting a plaintiff's testimony are legally insufficient, the
20 appropriate remedy is to remand the case for an award of benefits if it is clear from the record
21 that the ALJ would be required to determine the plaintiff disabled if the testimony had been
22 credited. *Orn*, 495 F.3d at 639 (citing *Connett v. Barnhart*, 340 F.3d 871, 878 (9th Cir. 2003));

01 accord *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002). To make this
02 determination requires consideration of plaintiff's remaining assignments of error.

03 Step Two Mental Impairment

04 At step two, plaintiff must make a threshold showing that his medically determinable
05 impairments significantly limit his ability to perform basic work activities. See *Bowen v.*
06 *Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work
07 activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§
08 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not
09 severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal
10 effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.
11 1996) (quoting Social Security Ruling (SSR) 85-28). "[T]he step two inquiry is a de minimis
12 screening device to dispose of groundless claims." (*Id.*) (citing *Bowen*, 482 U.S. at 153-54).
13 An ALJ is also required to consider the "combined effect" of an individual's impairments in
14 considering severity. (*Id.*)

15 Plaintiff assigns error to the ALJ's determination that he does not have a severe mental
16 impairment. Plaintiff avers that the ALJ relied on outdated assessments, and that the medical
17 evidence establishes his depression subsequently worsened, causing significant impairment of
18 functioning. In particular, plaintiff cites the records from the Interfaith Clinic, including a
19 consultation at Interfaith Clinic Behavioral Health and counseling records from the Interfaith
20 Mental Health Partnership Project, as well as the DSHS psychological evaluation by Dr. Ellen
21 Lind and the assessment at the Whatcom Counseling and Psychiatric Clinic. Plaintiff takes
22 issue with the ALJ's consideration of these records, contending the lack of persuasiveness of

01 the treatment notes cited by the ALJ and the disregard of other, more relevant, notes.

02 The Commissioner disputes any error in the ALJ's consideration of the opinions of
03 nurse practitioner Muriel Handschy and licensed mental health counselor Bob Poole, noting
04 that these individuals do not qualify as "acceptable medical sources" for purposes of diagnosing
05 medically determinable impairments. 20 C.F.R. §§ 404.1513(a), 416.913(a). The
06 Commissioner asserts that the ALJ was not bound to adopt the opinion of psychologist Dr.
07 Lind, or any provider, as to either the existence of an impairment or the ultimate determination
08 of disability. *Tonapetyan v. Halter*, 242 F.3d 1114, 1148 (9th Cir. 2001). Further, the
09 Commissioner argues, the ALJ was justified in giving Dr. Lind's report "scant weight" because
10 it did not mention specific clinical findings, was not supported by the longitudinal record, was
11 based largely on plaintiff's non-credible description of his symptoms, and contained
12 speculation. (AR 17-18.) The Commissioner points out that the treatment notes from the
13 providers at Interfaith Community Health Center contain minimal mention of depression (AR
14 437-38, 440, 442-43.) The Commissioner cites the opinions of reviewing psychologist Dr.
15 Burton and examining physician Dr. Parlatore as support for the ALJ's conclusion that plaintiff
16 did not suffer from a medically determinable mental impairment. (AR 179-92, 314-17.)

17 In considering the presence of a severe mental impairment at step two, the ALJ found as
18 follows:

19 There is some evidence of a mental condition. The [plaintiff] said that he
20 had a history of heroin abuse, now in remission. The [plaintiff] underwent
substance abuse treatment in early 2005. The [plaintiff] said that he had
21 difficulty with sustained concentration and memory.

22 Examinations following chemical dependency treatment show that the
[plaintiff] improved and was quite well. Anselm Parlatore, M.D., examined the

01 [plaintiff] in May 2006 and diagnosed opiate dependence in remission, with a
02 GAF of 65. In his opinion, any limitations were physical, not mental. That is
03 consistent with the mental status examination which, although brief, was
entirely normal.

04 Ellen Lind, Ph.D. prepared a psychological assessment in May 2007,
05 diagnosing the [plaintiff] with depression and opioid dependence in remission,
06 and a range of moderate to marked limitations. Dr. Lind did not mention
07 specific clinical findings, but based her report largely on the [plaintiff's]
08 description of his symptoms, largely his pain allegations, along with some
09 speculation on possible effects on social functioning. This assessment is not
10 given much weight. To be fair, Dr. Lind referred to counseling by someone
11 named "Peg Davies"; those records were not made available. However, there
12 are mental treating reports. They show that the [plaintiff's] mental status
13 presentation was within normal limits. Indeed, the Interfaith treatment notes
14 are not particularly supported by the longitudinal record, or the characterization
15 of his depression as no more than "mild." Those notes do not support
16 significant mental impairment and Dr. Lind's report is given scant weight.

17 In March 2008 the [plaintiff] was seen at Whatcom Counseling and
18 Psychiatric Clinic. He was assessed with depression and substance abuse in
19 remission, and a GAF of 52. This was based on subjective statements, but his
20 mental status functioning was essentially normal. That testing is not consistent
21 with that GAF assessment.

22 DDS reviewing sources concluded that the [plaintiff] had no medically
determinable mental impairment. The undersigned agrees. The [plaintiff's]
sole mental impairment is heroin addition [sic], in remission since July 11, 1005.
It imposes no limitations in daily living activities, social functioning,
concentration, persistence, and pace. There have been no episodes of
decompensation. For these reasons, the [plaintiff] does not have a severe
mental impairment.

(AR 17-18; internal citations to administrative record omitted.)

The Commissioner correctly argues that a finding of a medically determinable
impairment requires a diagnosis by an "acceptable medical source". 20 C.F.R. §§
404.1513(1), 416.913(a). Examining psychologist Ellen Lind Ph.D. is an "acceptable medical
source" as defined by the regulations, but the Commissioner argues that the ALJ properly
rejected her opinion "because it did not mention specific clinical findings, was not supported by

01 the longitudinal record, was based largely on Plaintiff's non-credible description of his
02 symptoms, and included speculation as to the possible effects on his social functioning". (Dkt.
03 16 at 10.)

04 These reasons do not survive scrutiny. The ALJ did not find that Dr. Lind's opinion
05 was unsupported "by the longitudinal record." (AR 18.) Rather, the ALJ made this finding
06 with regard to the treatment notes from the Interfaith Community Health Center. (AR 397-461.)
07 Moreover, Dr. Lind's report does articulate specific clinical findings with regard to such
08 symptoms as "depressed mood", "verbal expression of anxiety or fear", and "hallucinations",
09 "hyperactivity", and the degree of severity of each, ranging from "none" to "severe". (AR 369.)
10 The ALJ does not explain what other "clinical findings" would be required to substantiate a
11 diagnosis of a mental impairment. The ALJ characterizes Dr. Lind's assessment of plaintiff's
12 functional limitations as "speculation on possible effects on social functioning", but there is no
13 evidence Dr. Lind disregarded the evaluation form instructions to: "Base the degree of
14 limitation on reports by the individual and others concerning behavior over the past month and
15 interpretation of appropriate tests, along with your own observation during the interview." (AR
16 370.)

17 The ALJ discounted Dr. Lind's opinion primarily for the reason that the doctor "based
18 her report largely on the [plaintiff's] description of his symptoms, largely his pain allegations"
19 (AR 18.) This finding likewise does not withstand scrutiny. Dr. Lind's Psychological/
20 Psychiatric Evaluation makes reference to plaintiff's mental functioning and symptomatology,
21 not to his description of his pain complaints. (AR 368-71.) In her evaluation, Dr. Lind noted:
22 "Feels defeated by life. Hopeless. Chronic worries. Lethargic. Worries constantly. Panic

01 attacks often. Problems with concentration.”; “Ongoing problems w/concentration and focus.
02 Forgetful. Hard time sticking with a thought and on daily tasks. Hard time w/motivation
03 daily; has to push himself to get things done.” (AR 368-69.) Although the ALJ cited “mental
04 treating reports” as showing plaintiff’s mental status presentation was within normal limits, the
05 reports cited by the ALJ in support of that finding are physical treating reports that only
06 incidentally address plaintiff’s mental status. (AR 403, 410, 431, 468.) In sum, the
07 Commissioner’s argument that the ALJ appropriately rejected Dr. Lind’s opinion because it
08 was based on plaintiff’s unreliable claims is not well taken.

09 Nurse practitioner Muriel Handschy and licensed mental health counselor Bob Poole
10 also diagnosed depression. (AR 438, 442-43, 472-480.) While these individuals are not
11 considered “acceptable medical sources,”² nevertheless, as “other sources”, the ALJ must
12 provide germane reasons for disregarding their opinion. C.F.R. §§ 404.1513(d)(1),
13 416.913(d)(1). *See also Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). The ALJ did
14 not address the opinions of either provider by name, referring only to the treatment facility
15 where each was employed. (AR 18.) As argued by plaintiff, the ALJ’s reference to the
16 Interfaith Community Health Center notes (*see* AR 397-461) is ambiguous and contradictory,
17 stating: “Indeed, the Interfaith treatment notes are not particularly supported by the longitudinal
18 record, or the characterization of his depression as no more than ‘mild.’” (AR 18.) The
19 Interfaith Community Health Center records are the longitudinal record—plaintiff did not get
20 treatment anywhere else for a similar length of time. Further, nurse Handschy was not the only

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22 ² *But see Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996) (holding that a nurse practitioner’s opinion constituted an acceptable medical source where the nurse “worked closely under the supervision” of the doctor such that the nurse was “acting as an agent” of the doctor).

01 individual at Interfaith Community Health Center providing services to plaintiff. The ALJ did
02 not discuss (and therefore did not provide “germane” reasons for disregarding) the opinion of
03 Lisa Harmon, a behavioral health consultant, who wrote on December 14, 2006: “Cymbalta is
04 not having positive effects on depression, rather it has caused (per [patient]) an increase in poor
05 memory, anxiety and possibly nightmares. Doing well in therapy with Peg Davies[.]” (AR
06 429.)

07 In finding plaintiff had no medically determinable mental impairment, the ALJ relied on
08 the opinion of DSHS reviewing psychologist Richard Borton Ph.D. (AR 179-91), who
09 apparently reviewed only the May 2006 examination report of Anselm Parlatore M.D. (AR
10 314-17). Dr. Borton’s report is insufficient by itself to support the ALJ’s conclusion, as the
11 report of a non-treating, non-examining physician, even when combined with the ALJ’s own
12 observance of the plaintiff’s demeanor at the hearing, does not constitute substantial evidence.
13 *Lester*, 81 F.3d at 831. Dr. Parlatore administered a cognitive exam, finding plaintiff had
14 intact memory, concentration, fund of information, and abstraction. He felt with respect to
15 plaintiff’s disability: “[S]eems predominately physical in nature and not psychiatric. In
16 terms of his ability to handle stress and focus and concentrate and his pace and persistence they
17 are only mildly affected by any psychiatric symptomatology. There is no impairment of his
18 intellectual capacity to understand, follow and remember both complex and simple instructions
19 and there is no psychiatric reason for problems with his ability to carry out specific tasks in a
20 timely and consistent manner.” (AR 317.) However, in light of the more recent treatment
21 records from the Interfaith Clinic, the Whatcom Counseling and Psychiatric Clinic, and the
22 assessment of Dr. Lind, together with the fact that plaintiff was referred for mental health

01 counseling and developed an extended counseling relationship with Peg Davies, the earlier
02 report from Dr. Parlatore, even though supportive of the ALJ's finding, is not sufficient to
03 constitute substantial evidence in support of the conclusion that plaintiff had no medically
04 determinable mental impairment.

05 Listing of Impairment

06 At step three, the ALJ must consider whether the claimant's impairments meet or equal
07 one of the impairments in the "Listing of Impairments" set forth in Appendix 1 to 20 C.F.R.
08 Part 404, Subpart P. Plaintiff bears the burden of proving the existence of impairments
09 meeting or equaling a listing. *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005).

10 The ALJ found plaintiff did not have an impairment or combination of impairments that
11 meets or medically equals one of the listed impairments, noting that plaintiff's impairments "do
12 not cause ineffective ambulation or inability to use the upper extremities [and] do not impose
13 significantly limited motor, sensory or reflex loss." (AR 18.) Plaintiff takes issue with this
14 finding, arguing the ALJ's step three finding is *per se* erroneous because of the failure to
15 properly consider his mental impairment at step two. This lack of inclusion, plaintiff argues,
16 means that the consideration of the combination of severe impairments was incomplete.
17 However, plaintiff does not specify which listing he believes he would meet if the mental
18 impairment was considered, or cite to any evidence which would support the findings of a
19 specific listing if this were included in the consideration. *See Burch*, 400 F.3d at 683 ("An
20 ALJ is not required to discuss the combined effects of a claimant's impairments or compare
21 them to any listing in an equivalency determination, unless the claimant presents evidence in an
22 effort to establish equivalence.")

01 Plaintiff further argues that the ALJ erred in rejecting the opinion of examining doctor
02 Milt Schayes, M.D., that his back impairment equaled Listing 1.04, “Disorders of the Spine”.
03 Dr. Schayes was asked in a written interrogatory if plaintiff had a spinal disorder which, if not
04 meeting the listing requirements of 1.04, medically equals that listing. Dr. Schayes responded:
05 “Yes. Failed lumbar laminectomy syndrome (surgery on 5-19-95).” (AR 463.) When asked
06 to state the basis for this opinion, Dr. Schayes referenced the history taken from the plaintiff and
07 records review, several examinations, and a review of imaging studies including lumbar MRI
08 scans. (*Id.*) When asked for further clarification (*see* AR 65), Dr. Schayes cited complaints
09 of low back pain with radiating leg pain, limited lumbar range of motion upon examination,
10 weakness of the left ankle dorsiflexors and left great toe extensor, and sensory changes
11 corresponding to the dermatome on the left foot. (AR 462-63.) Further, Dr. Schayes cited the
12 clinical imaging findings as “corresponding very closely” to the specific listing requirements of
13 1.04(A) and (C). (AR 489.)

14 The ALJ did not accept this opinion, citing the lack of evidence of positive straight leg
15 raising in either the sitting or standing position, motor loss, nerve root compression, spinal
16 arachnoiditis, pseudoclaudication, or the inability to ambulate effectively. With regard to the
17 limited range of motion, the ALJ noted that it appeared only in extension but not with other
18 movements and the plaintiff was able to walk normally, manage his pain with medication and to
19 do well with physical therapy. (AR 20 (citing AR 224-52, 266-98, 299-313, 323-24, 333, 329,
20 464-71, 481-88.)) Further, the ALJ gave Dr. Schayes’ opinion “scant weight” because he had
21 little actual hands-on treatment of plaintiff. (AR 20 (citing AR 444-45).)

22 Plaintiff takes issue with this finding, saying Dr. Schayes’ opinion presents a “plausible

01 theory of medical equivalence to a listing”, even if the signs and symptoms do not precisely
02 match the listing specifications. (Dkt. 17 at 12.) The Commissioner, however, correctly
03 notes that Dr. Schayes failed to explain how his medical findings either satisfy all of the criteria
04 in Listing 1.04(A) or (C), or are “at least equal in severity and duration to the criteria” of those
05 impairments. 20 C.F.R. §§ 404.1526(a), 416.926(a). Equivalence will be determined “on the
06 basis of a comparison between the ‘symptoms, signs and laboratory findings’” of the claimant’s
07 impairment and the medical criteria of the listed impairment. *Marcia v. Sullivan*, 900 F.2d
08 172, 176 (9th Cir. 1990). It is the province of the ALJ to determine medical equivalence. *See*
09 SSR 96-5p. Although Dr. Schayes listed his findings, he did not explain why these findings
10 cause an impairment “at least equal in severity and duration to the criteria” of Listing 1.04, that
11 is, either evidence of nerve root compression, spinal arachoiditis, or lumbar spinal stenosis.
12 Accordingly, the ALJ did not err in rejecting Dr. Schayes’ opinion that plaintiff’s back
13 impairment was equivalent in severity to Listing 1.04.

14 Residual Functional Capacity

15 At step four, the ALJ must identify plaintiff’s functional limitations or restrictions, and
16 assess his work-related abilities on a function-by-function basis, including a required narrative
17 discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; SSR 96-8p. RFC is the most a claimant can
18 do considering his or her limitations or restrictions. *See* SSR 96-8p. The ALJ must consider
19 the limiting effects of all of plaintiff’s impairments, including those that are not severe, in
20 determining his RFC. §§ 404.1545(e), 416.945(e); SSR 96-8p.

21 In this case, the ALJ concluded plaintiff had the RFC to perform the full range of light
22 work, with occasional postural movements and frequent overhead reaching with the right upper

01 extremity. Finding no mental impairment at step two, the ALJ did not assign any related
02 limitations.

03 Plaintiff contends the ALJ's RFC determination is *per se* incomplete, because of the
04 failure to consider his depression, as well as his sciatica and foot numbness. Plaintiff also
05 takes issue with the ALJ's quantification of the amount of walking involved in light work,
06 contending the required six to eight hours per day is beyond even his abilities as assessed by the
07 ALJ. Other deficiencies in the ALJ's RFC findings identified by plaintiff include a failure to
08 assess appropriate lifting and reaching limitations, his need to alternate between sitting,
09 standing and lying down, as well as other postural limitations. In response, the Commissioner
10 argues the ALJ properly weighed the evidence, discredited plaintiff's subjective symptoms, and
11 provided legally sufficient reasons for incorporating those limitations found by the ALJ to be
12 supported by the evidence.

13 As previously found, the ALJ erred in the assessment of plaintiff's credibility,
14 specifically, as applied to his testimony about the intensity, persistence and limiting effects of
15 his symptoms. When this testimony is credited, it is apparent the ALJ's RFC assessment is
16 deficient as to plaintiff's abilities. (*See* AR 47-57.) Further, plaintiff has identified other
17 inconsistencies in the ALJ's RFC findings. Dr. Bruce, the orthopedist who treated plaintiff's
18 non-repairable "chronic massive rotator cuff tear", indicated plaintiff had "essentially no
19 functioning cuff" and "should avoid a lot of overhead lifting and reaching[,]” adding that “[t]he
20 prognosis is for ongoing symptoms which may gradually get worse over time.” (AR 326.)
21 Although the ALJ indicated Dr. Bruce's opinion was taken into account in assessing plaintiff's
22 RFC (AR 20), this cannot be reconciled with the ALJ's assessment that plaintiff could perform

01 frequent overhead reaching. (AR 18.) Also, while the ALJ indicated “greater weight” was
02 given to the DDS assessment by Dr. Bernardez-Fu (AR 21, 171-79), that consultant assessed
03 specific postural limitations not incorporated by the ALJ such as occasional balancing, bending,
04 stooping, kneeling, crouching, or climbing ramps or stairs, and never climbing ropes, ladders or
05 scaffolds. (AR 173.) The ALJ included “occasional postural movements” in the RFC without
06 specifying which movements were included, and without accepting or rejecting Dr.
07 Bernardez-Fu’s opinion in this regard. Although finding at step four that plaintiff was not able
08 to perform his usual work as a carpenter, the deficiencies in the ALJ’s RFC assessment
09 particularly impact the step five determination.

10 Step Five

11 At step five of the sequential evaluation process, the burden shifts to the Commissioner
12 to show the claimant can perform other jobs that exist in the national economy. *Pinto v.*
13 *Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). An ALJ may rely on the Medical-Vocational
14 Guidelines (“guidelines” or “grid”) to meet his burden at step five. *Burkhart v. Bowen*, 856
15 F.2d 1335, 1340 (9th Cir. 1988). “They may be used, however, ‘only when the grids
16 accurately and completely describe the claimant’s abilities and limitations.’” *Id.* (quoting
17 *Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985)). “When a claimant’s non-exertional
18 limitations are ‘sufficiently severe’ so as to significantly limit the range of work permitted by
19 the claimant’s exertional limitations, the grids are inapplicable[.]” and the testimony of a
20 vocational expert (VE) is required. *Id.* (quoting *Desrosiers v. Secretary of Health & Human*
21 *Servs.*, 846 F.2d 573, 577 (9th Cir. 1988)). *Accord Tackett v. Apfel*, 180 F.3d 1094, 1103-04
22 (9th Cir. 1999) (“Because Tackett’s non-exertional limitations ‘significantly limit the range of

work' he can perform, mechanical application of the grids was inappropriate.”)

Utilizing the guidelines as a framework, the ALJ found plaintiff capable of performing other work at step five. Plaintiff argues that the ALJ erred in finding that the occupational base of light work was not significantly limited by his non-exertional impairments, and that the ALJ should instead have called upon the services of a VE. As a result, plaintiff contends, the ALJ's step five determination lacks the support of substantial evidence.

If the only error was the lack of consideration of limitations resulting from plaintiff's depression, the ALJ's reliance on the grids might not rise to the level of harmful error. (*See Hoopai v. Astrue*, 499 F.3d 1071, 1076-77 (9th Cir. 2007) (substantial evidence supported the ALJ's conclusion that a claimant's depression, with evidence of various associated moderate limitations, was not a sufficiently severe non-exertional limitation prohibiting reliance on the grids without the assistance of a VE). However, when the postural limitations described above are added, plaintiff's point is well taken. *See Tackett v. Apfel*, 180 F.3d 1084, 1103-04 (9th Cir. 1999) (a claimant's "need to shift, stand up, or walk around every 30 minutes [was] a significant non-exertional limitation not contemplated by the grids[]" and, therefore, "mechanical application of the grids was inappropriate.") Considering these non-exertional limitations cumulatively, substantial evidence does not support the ALJ's determination that the limitations were not sufficiently significant and severe so as to preclude reliance on the grids.

CONCLUSION

For the foregoing reasons, the Commissioner failed to meet his burden at step five of the sequential evaluation process to show that plaintiff is capable of performing other work that

01 exists in substantial numbers in the economy. Because plaintiff was found not capable of
02 performing his usual and customary work, he is disabled. This case should be remanded for an
03 award of benefits.

04 DATED this 1st day of October, 2009.

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07 Mary Alice Theiler
08 United States Magistrate Judge
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